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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 CHESTNUT BUILDING
PHILADELPHIA, PENNSYLVANIA 19107

IN THE MATTER OF:	:	
	:	DOCKET NO. CWA-III-137
INDUSTRIAL ELEVATOR MAINTENANCE COMPANY, INC.	:	Proceeding to Assess Class I Civil Penalty Under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)
Washington County, PA,	:	
RESPONDENT	:	

DECISION AND FINAL ORDER OF THE REGIONAL ADMINISTRATOR

This is a proceeding for the assessment of a Class I administrative penalty under Subsection 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). The proceeding is governed by the Environmental Protection Agency's Proposed 40 C.F.R. Part 28--CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CLASS I CIVIL PENALTIES UNDER THE CLEAN WATER ACT, THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT, AND THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT, AND THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES UNDER PART C OF THE SAFE DRINKING WATER ACT, 56 Fed. Reg. 29,996 (July 1, 1991), issued October 29, 1991 as superseding procedural guidance for Class I administrative penalty proceedings under Subsection 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g) ("Consolidated Rules"). This is the Decision and Order of the Regional Administrator under § 28.28 of the Consolidated Rules. There is no dispute as to liability at this stage of the

proceeding; the sole issue to be determined is the amount of the administrative penalty to be assessed.

APPEARANCES

The Complainant was represented by Joyce A. Howell, Assistant Regional Counsel, U.S. Environmental Protection Agency, Region III, Philadelphia, Pennsylvania. Respondent was represented by Ronald C. Gahagan and David G. Ries of Thorp, Reed & Armstrong of Pittsburgh, Pennsylvania.

STATUTORY BACKGROUND

The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Subsection 101(a) of the Clean Water Act, 33 U.S.C. § 1251(a). One key provision of the Act is the prohibition on unauthorized discharges of pollutants: "Except as in compliance with this section and sections 1312, 1316, 1317, 1318, 1342 and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." Subsection 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a)(emphasis added).

Section 402 of the Clean Water Act, 33 U.S.C. § 1342, provides for the issuance of permits for the discharge of pollutants from point sources under the National Pollutant Discharge Elimination System (NPDES). Such permits establish numerical limitations on the mass and concentration of specific pollutants, and also require the permittee to sample, analyze and report on the quality of the discharge periodically. In Pennsylvania, NPDES permits are issued

by the Pennsylvania Department of Environmental Protection, formerly the Department of Environmental Resources.

Section 309 of the Clean Water Act, 33 U.S.C. § 1319, provides for administrative, civil and criminal enforcement actions against person who have violated the prohibition of Subsection 301(a). Administrative penalties may be assessed under subsection 309(g) of the Act, 33 U.S.C. § 1319(g): "Whenever on the basis of any information available-(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title...the Administrator...may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection." Before assessing a Class I civil penalty, the Administrator must give the person to be assessed such penalty written notice of the proposed penalty and the opportunity to request, "within 30 days of the date the notice is received by such person," a hearing. Subsection 309(g)(2)(A) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(A). Before issuing an order assessing a civil penalty under this subsection the Administrator must provide public notice of and a reasonable opportunity to comment on the penalty assessment. Subsection 309(g)(4) of the Clean Water Act, 33 U.S.C. § 1319(g)(4).

PROCEDURAL BACKGROUND

The Water Management Division Director (now the Water Protection Division Director) of Region III of EPA (Complainant)

initiated this action on September 29, 1994, issuing to the Industrial Elevator Maintenance Company (Respondent) an administrative complaint under § 28.16(a) of the Consolidated Rules. The administrative complaint alleged that Respondent violated Section 301 of the Clean Water Act, 33 U.S.C. § 1311, by failing to analyze its effluent and to file Discharge Monitoring Reports (DMRs) as required by Respondent's National Pollutant Discharge Elimination System (NPDES) permit. The administrative complaint made reference to pertinent provisions of the Clean Water Act and provided notice of a proposed penalty of $25,000. The administrative complaint also provided notice that failure to respond to the administrative complaint within thirty days would result in the entry of a default order and informed Respondent of her opportunity to request a hearing. Complainant transmitted a copy of the Consolidated Rules with the administrative complaint.

On September 29, 1994, in accordance with subsection 309(g)(1) of the Clean Water Act, 33 U.S.C. § 1319(g)(1), and § 28.19 of the Consolidated Rules, Complainant afforded the Commonwealth of Pennsylvania an opportunity to confer with EPA regarding the proposed penalty assessment.

Pursuant to section 309(g)(4) of the Clean Water Act, 33 U.S.C. § 1319(g)(4), Complainant also provided public notice of the proposed penalty assessment, specifying a proposed penalty of $19,110 by mistake instead of the $ 25,000 proposed in the

administrative complaint. Complainant received no response to the public notice. (Tr. 25).

By ORDER OF ASSIGNMENT dated October 7, 1994, the Regional Administrator designated the Presiding Officer in this proceeding pursuant to § 28.16(h) of the Consolidated Rules.

The parties engaged in preliminary settlement discussions, and they were able to reach agreement on some matters. In the absence of a full settlement, Respondent filed its response to the administrative complaint and request for hearing on May 30, 1995.

On July 5, 1995, the Presiding Officer held a prehearing conference with the parties. On July 15, 1995, the Presiding Officer issued a prehearing order, setting deadlines for the prehearing exchange of information and setting a date for hearing.

The hearing was held on September 28, 1995. At the outset of the hearing counsel stipulated that there were no liability issues to be heard, having resolved the disputed liability allegations during prehearing discussions. The parties asserted a compelling need to be heard on the issue of a civil penalty, so testimony on the statutory penalty factors was taken.

The Complainant presented the testimony of Anthony D. Meadows, an EPA environmental engineer who calculated the penalty proposed in the administrative complaint and the expert testimony of Ann CZ Heller, of Industrial Economics, Inc., with regard to the Respondent's ability to pay a civil penalty. The Respondent

presented the testimony of its President, Raymond A. Gielarowski, and the expert testimony of Lance R. Cunningham, President of Wyngran, Hughan & Company, who testified about Respondent's financial condition. The parties chose not to make post-hearing submissions.

FACTUAL SETTING

Respondent operates its business from an industrial building in Cecil Township, Washington County, in western Pennsylvania. The facility has an NPDES permit, No. PA0095591, for the discharge of pollutants to Miller's Run, a navigable water within the jurisdiction of the Clean Water Act. Part A of the NPDES Permit requires Respondent to monitor the quality of its effluent by sampling at specified time intervals and analyzing the levels of specified pollutants in the sampled effluent. The results of this monitoring are to be reported on specified forms (Discharge Monitoring Reports or DMRs) on a monthly basis. It is undisputed that Respondent failed to monitor and report from May, 1993 through July, 1994.[1]

[1] In the administrative complaint Complainant alleged that Respondent's failure to analyze and report extended from May, 1993 through September, 1994. In response to the administrative complaint Respondent admitted that it had failed to analyze and monitor from May, 1993 through July, 1994, but denied the alleged failure to monitor and report in August and September of 1994. At the hearing the parties stipulated that the Respondent's failure did not extend beyond July of 1994, and that Complainant had a reasonable basis to make the allegations as to August and September when it filed the administrative complaint. Transcript, pp.13-14.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO LIABILITY

With the exception of the Complainant's allegations regarding August and September, discussed in Footnote 1, above, all elements of liability were admitted by the Respondent in its Response, either directly or indirectly, by failing to deny the allegations.[2] As Complainant has essentially withdrawn those contested allegations, Respondent's liability is undisputed. Accordingly, the remaining allegations are hereby adopted as findings of fact and conclusions of law:

1. Industrial Elevator Maintenance Company, Inc. is a corporation doing business in Pennsylvania, is a person within the meaning of Section 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5), and operates an elevator maintenance facility located in Cecil Township, Washington County, Pennsylvania, which discharges pollutants from a point source to Miller's Run. (Administrative complaint § II.1; Response § I.1).

2. Miller's Run is a navigable water as set forth in Section 502(7) of the Act, 33 U.S.C. § 1362(7). Respondent is therefore subject to the provisions of the Act, 33 U.S.C. § 1251 et seq. (Administrative complaint § II.2; Response I.2).

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[2] Section 28.20(d) of the Consolidated Rules provides: Admission. Each uncontested allegation in the administrative complaint as to liability is deemed admitted by the respondent, whether by the respondent's failure to make a timely response pursuant to paragraph (a) or (b) of this section, whichever applies, or by the respondent's failure in a timely response to deny such allegation included in the administrative complaint.

3. On May 11, 1993 pursuant to Section 402 if the Act, 33 U.S.C. § 1342 and the Pennsylvania Clean Streams Law, as amended, 35 P.S. Section 691.1 et seq., the Pennsylvania Department of Environmental Resources issued NPDES Permit No. PA0095591 to Respondent for the discharge of pollutants from its Cecil Township, Pennsylvania, facility. The Permit became effective on May 11, 1993 and expires on May 11, 1998. (Administrative complaint § II.3; Response § I.3).

4. Part A of the Permit contains monitoring requirements and effluent limitations for several pollutants. (Administrative complaint § II.4; Response § I.4).

5. Respondent has violated the Permit's monitoring requirements by failing to analyze for the effluent parameters from May, 1993 through July, 1994. Further, Respondent failed to submit discharge monitoring reports for the specified period. (Administrative complaint § II.5; Response § I.5; Transcript p. 170 ff, p. 646 ff.).

6. EPA has consulted with the Pennsylvania Department of Environmental Resources regarding the proposed action by mailing a copy of the administrative complaint to the appropriate State official and offering an opportunity for the State to consult with EPA on the proposed penalty assessment. (Administrative complaint § II.6.; Response § I.6;).

7. Respondent has violated Section 301(a) of the Act, 33 U.S.C. § 1311(a), by failing to comply with the effluent monitoring

and reporting requirements of NPDES Permit No. PA0095591. (Although the administrative complaint did not contain this specific allegation, it certainly follows from the allegations of discharge and failure to comply with the NPDES Permit in sections II.1 and II.5 of the administrative complaint and Respondent's corresponding admissions).

8. Under subsection 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), Respondent is liable for the administrative assessment of a civil penalty in an amount not to exceed $10,000 per day for each day the violation continues, up to a maximum of $25,000.

PENALTY ASSESSMENT

Subsection 309(g)(3) of the Clean Water Act, 33 U.S.C. § 1319(g)(3), specifies the factors to be considered in determining the amount of a penalty assessed under that subsection of the statute:

> In determining the amount of any penalty assessed under this subsection, the Administrator ... shall take into account the **nature, circumstances, extent and gravity of the violation, or violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require...** (emphasis added).

Based upon the administrative record, I have taken into account the following matters in considering the statutory factors before determining an appropriate civil penalty:

Nature: This is a case of failure to monitor and report discharges for a 15-month period. The absence of effluent data for the time period involved makes it impossible to determine whether Respondent discharged pollutants in excess of the limits set forth in the Permit, to assess the impact of the discharge on the receiving waters' assimilative capacity, or to integrate the missing data into other water quality analysis activities. The missing reports a much more than missing paper-Respondent's violations undermine our ability to manage our water resources on an informed basis.

Circumstances: Respondent's president stated that he was unaware of the monitoring and reporting requirements of the Permit until they were brought to his attention by regulatory authorities. Mr. Gielarowski also stated that Respondent had installed water pollution control equipment voluntarily some ten years ago, and that other dischargers in the area still discharge untreated pollutants.

Extent: The violations extended from May of 1993 through July of 1994, a 15-month period. Three different types of violation of the Permit occurred each month: failure to sample (twice monthly), failure to analyze (twice monthly) and failure to report (once monthly).

Gravity: Respondent's failure to comply with the monitoring and reporting requirements of the Permit is relatively serious. Nothing is known about the effluent that Respondent discharged over the 15 months of noncompliance. Although there is no evidence in

the record that Respondent discharged pollutants in excess of the limitations in the Permit, it is not possible to be certain that Respondent complied with the numerical effluent limitations contained in the Permit during this period. There simply is no information regarding the quality of the discharge.

Because the Clean Water Act's NPDES relies on self-monitoring and self-reporting as a primary source of information regarding water quality, any gaps in effluent reporting cause a kind of programmatic harm to the integrity of the Nation's clean water efforts. When sampling and analysis are not performed, the gaps are permanent, and obviously the longer the failure to monitor and report lasts, the larger the gap in water quality information.

Respondent's ability to pay: In a proceeding under the Consolidated Rules the respondent is to bear the burden of going forward to present exculpatory statements as to liability and statements opposing the complainant's request for relief. See § 28.10(b)(1) of the Consolidated Rules. The complainant does not have the burden of persuading Agency decisionmakers on the respondent's inability to pay if the respondent has failed to come forward with such information by the applicable deadline.

Here, Respondent's entire case hangs on its assertion that it is unable to pay a penalty. Relying on the EPA Environmental Appeals Board's decision In re: New Waterbury, Ltd., TSCA Appeal No. 93-2 (October 20, 1994), Respondent argued at hearing that the Complainant had the burden of proving that it properly analyzed the

Respondent's ability to pay a penalty when the penalty was proposed, that Complainant failed to do so, and that therefore no penalty should be assessed. The Presiding Officer observed that the statute requires that Respondent's ability to pay must be considered prior to the assessment of a penalty, and that the penalty assessment function under the Consolidated Rules is assigned to the Regional Administrator, not to the Complainant. (Tr. 89).

New Waterbury was a proceeding under 40 C.F.R. Part 22, EPA's procedural rules for enforcement sanctions, including administrative penalties, developed to conform to the procedural requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551-559. New Waterbury was a Toxic Substances Control Act action involving an APA penalty hearing provided by law in accordance with section 554 of Title 5. See Section 16(a)(2) of TSCA, 16 U.S.C. § 2615(a)(2). The Environmental Appeals Board observed, "[t]he APA provides that 'except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.' APA § 7(c), 5 U.S.C. § 556(d)." New Waterbury, p. 10. The Board went on to state that while the Complainant had the burden of proof to show that the penalty was appropriate (based upon 40 C.F.R. § 22.24: "..complainant has the burden of going forward and proving that...the proposed civil penalty...is appropriate"), there was no separate burden for each of the individual factors set forth in TSCA. Id., p. 12. The Board expressly rejected the respondent's

argument that the complainant must prove that a respondent has the funds to pay a proposed penalty and stated that inability to pay does not by itself preclude imposition of a penalty. Id., p. 14. At hearing, the complainant must produce "..some evidence regarding the respondent's general financial status from which it can be inferred that the respondent's ability to pay should not affect the penalty amount...some evidence to show that it considered the respondent's ability to pay a penalty." Id., pp. 15, 17. If the respondent produces specific evidence that it cannot pay any penalty, the complainant must respond either through cross examination or rebuttal, or both. Id. p. 17.

Unlike New Waterbury, this case, by law, is not an APA case. "Such hearing shall not be subject to section 554 or 556 of Title 5..." Section 309(g)(2)(A) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(A). Thus, the APA-based procedures of 40 C.F.R. Part 22 do not apply; this case is under the (non-APA) Consolidated Rules. Nor do the "burden-placing" rules of section 7(c) of the APA, 5 U.S.C. § 556(d), or of 40 C.F.R. § 22.24 apply to this case; instead § 28.10(e) of the Consolidated Rules applies: "...the proponent of an argument to the Presiding Officer has the burden of persuasion."

Respondent argued that Complainant had not properly considered Respondent's inability to pay a penalty when the administrative complaint was issued. (Tr. pp.85-86). Under Part 22, at the complaint stage, "[t]he dollar amount of the proposed civil penalty

shall be determined in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty and with any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.14(c)(emphasis added). There is no comparable provision in the Consolidated Rules that govern this proceeding. If a default order is entered in a Part 22 case, "the penalty proposed in the complaint shall become due and payable by respondent without further proceedings..." [40 C.F.R. § 22.17(a)], while under the Consolidated Rules a default as to liability under § 28.21(a) is followed by a remedy determination (penalty assessment) proceeding under § 28.21(b). In an initial decision under § 22.27(b) of the APA rules, the Presiding Officer must explain any deviation from the proposed penalty-no such requirement appears in the Consolidated Rules here.

These distinctions between EPA's APA-based rules and its non-APA rules might serve to distinguish the context of the New Waterbury case from this one, if a distinction were sought. One might say that Part 22 seems to attach more significance to the proposed penalty that do the Consolidated Rules. In point of fact, however, in both cases the Complainant met its burden by examining the general financial information regarding the Respondent's financial status before filing the complaint and later by responding to specific financial evidence produced by the Respondent. In this case, ability to pay was the sole contested issue.

On the substantive issue of Respondent's ability to pay, the parties presented stipulated financial documents, factual testimony and conflicting expert opinion testimony. Respondent's tax returns and financial statements for 1991-1995 reflect the ups and downs of the business that Mr. Gielarowski, Respondent's president, described in his testimony. For example, according to the financial statements, Respondent's net worth ranged from $ 533,416 in 1991 to $ -224.788 in May of 1995. The tax returns show taxable net income ranging from $ 610 to $ 3612 for the same time period. These ranges are probably due in part to the risky nature of the business, in part to the changeable business climate and in part to the effects of a corporate merger. These documents also show that Respondent leases two Mercedes-Benz vehicles for executive use, and maintains a membership at a country club for entertaining clients. They also show substantial salary increases for officers. (Tr. 71-72).

Turning to the testimony of the experts, whose qualifications had been stipulated by counsel (Tr. 14-15), it is clear that their opinions cannot be reconciled. Ann Heller, who testified for the Complainant, had reviewed all of Respondent's tax returns and financial statements, concluded that "...payment of the $ 25,000 penalty in no way would provide any source of financial hardship for the firm..." (Tr. 73-73). Lance Cunningham, Respondent's accountant and expert at the hearing, said, "[m]y opinion is that they cannot afford to pay the $ 25,000 penalty." (Tr. 128) Mr.

Cunningham thought Respondent could pay a $ 1.00 penalty, but had no opinion on a $ 1,000 penalty (Tr. 156).

Review of their qualifications shows that Ms. Heller has a BA and an MBA, while Mr. Cunningham has a BA and he is also a CPA. Ms. Heller has no personal knowledge of the industrial elevator maintenance business, while Mr. Cunningham has been Respondent's accountant since 1980. However, Mr. Cunningham was unable to give the Presiding Officer an opinion regarding Respondent's ability to pay a penalty less than $ 25,000. (Tr. 155-156).

The preponderance of the evidence, taken as a whole, supports the arguments of the Complainant, rather than those of the Respondent. Although Respondent's finances evidently vary with sales volume and other factors, the financial documents describe a relatively successful enterprise. The impression given by a company that chooses to lease luxury vehicles for executive use and to maintain a country club membership is only marginally persuasive of ability to pay in this context--those perks may be simply necessary business trappings. The executive salary increases, though, are very clear indications that Respondent is able to pay a penalty. Combined with Ms. Heller's expert opinion, the facts support the conclusion that Respondent is able to pay.

On this record I am satisfied that Respondent is able to pay a civil penalty.

Prior history of such violations: There is no evidence in the record indicating that Respondent had any prior history of

violation of monitoring or reporting requirements of any NPDES permit. Complainant presented testimony that Respondent's "failure to have an NPDES permit" between 1989 and 1993 had been considered as a prior history of violation in Complainant's calculation of the proposed penalty (Tr. pp. 41-42). Respondent did not dispute that the NPDES Permit expired in 1989 and was not reissued until 1993. But there is no record evidence that Respondent discharged pollutants without a permit--Complainant did not look into that. (Tr. p.52). Mr. Meadows testified that he didn't know when they were discharging. "I know from the inspector that frequently no discharge was observed." (Tr. p. 54). While it is difficult to see how Respondent have operated without a discharge, it would be improper to infer discharge without a permit from the little evidence that points in the other direction. And given that there were no NPDES permit requirements for monitoring and reporting, there could not have been "prior such violations" during that time period. No evidence was introduced regarding monitoring or reporting violations of the Permit prior to the 1989 expiration. Accordingly, I conclude that there were no prior such violations.

Degree of culpability: Complainant introduced no evidence of culpability, asserting only its lack of information indicating any reason for failure to submit reports. (Tr. p.45). Respondent's president testified that he was not familiar with the terms and conditions of the Permit and that he was unaware of the monitoring and reporting requirements (Tr. 122, 123). This negligence is

evidence of culpability; NPDES permittees must know the terms and conditions of their permits as a practical necessity in order to comply, and as a legal necessity because the Clean Water Act is a strict liability statute. Save Our Bays and Beaches v. City and County of Honolulu, 904 F. Supp. 1098 (D. Hawaii, 1994); Friends of the Earth v. Laidlaw Environmental Services, 890 F. Supp. 470 (D. South Carolina, 1995); Stoddard v. Western Carolina Regional Sewer Authority, 784 F. 2d 1200 (4th Circuit, 1986).

Economic benefit or savings resulting from the violations: The parties apparently agreed that Respondent's economic benefit consisted solely of the avoided costs of conducting the sampling and analysis required by the Permit during the 15 months of stipulated violation. Complainant calculated an economic benefit of $ 3,614, based upon an estimated per sample cost of $ 250. (Tr. pp.38, 39). Since sampling is required twice monthly, the total amount would seem to be more like $ 7,500. Respondent estimated the monthly sampling and analysis cost at $ 152-155 (Tr. p. 103), or a 15-month total of $ 2,280-2,325. I conclude that there was an economic benefit of approximately $ 3,000.

Such other matters as justice may require: This statutory penalty factory allows the penalty assessor to evaluate the totality of the circumstances presented. Extraordinary cooperation in the Agency's investigation, environmentally beneficial expenditures, voluntary disclosures or an undue hardship may be considered in favor of the respondent; unusual investigatory costs or a negative, recalcitrant

attitude may be considered against a respondent. The record presents no other matters that require consideration in assessing a penalty. Accordingly, based upon the administrative record and the applicable law, I determine a civil penalty of $ 18,000 is appropriate in this case.

ORDER

On the basis of the administrative record and applicable law, including § 28.28(a)(2)(ii) of the Consolidated Rules, Respondent is hereby ORDERED to comply with all of the terms of this ORDER:

A. Respondent is hereby assessed a civil penalty in the amount of $ 18,000 and ORDERED to pay the civil penalty as directed in this ORDER.

B. Pursuant to § 28.28(f) of the Consolidated Rules, this ORDER shall become effective 30 days following its date of issuance unless the Administrator suspends implementation of the ORDER pursuant to § 28.29 of the Consolidated Rules (relating to sua sponte review).

C. Respondent shall, within 30 days after this ORDER becomes effective, forward a cashier's check or certified check, payable to "Treasurer, United States of America," in the amount of $ 18,000. Respondent shall mail the check by certified mail, return receipt requested, to:

United States Environmental Protection Agency
Region III
P.O. Box 360515
Pittsburgh, PA 15251-6515

In addition, Respondent shall mail a copy of the check, by first class mail, to:

Regional Hearing Clerk (3RC00)
United States Environmental Protection Agency
Region III
841 Chestnut Building
Philadelphia, PA 19107

D. In the event of failure by Respondent to make payment within 30 days of the date this ORDER becomes effective, the matter may be referred to the United States Attorney for collection by appropriate action in the United States District Court pursuant to subsection 309(g)(9) of the Clean Water Act, 33 U.S.C.§ 1319(g)(9).

E. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefor begin to accrue on the civil penalty if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 4 C.F.R. § 102.13(c).

In addition, a penalty charge of 6 percent per year will be assessed on any portion of the debt which remains delinquent more than 90 days after payment is due. However, should assessment of the penalty charge on the debt be required, it will be assessed as of the first day payment is due under 4 C.F.R. § 102.13(e).

JUDICIAL REVIEW

Respondent has the right to judicial review of this ORDER. Under subsection 309(g)(8) of the Clean Water Act, 33 U.S.C.

§ 1319(g)(8), Respondent may obtain judicial review of this civil penalty assessment in the United States District Court for the District of Columbia or in the United States District Court for the Western District of Pennsylvania by filing a notice of appeal in such court within the 30-day period beginning on the date this ORDER is issued (5 days following the date of mailing under § 28.28(e) of the Consolidated Rules) and by simultaneously sending a copy of such notice by certified mail to the Administrator and to the Attorney General.

IT IS SO ORDERED.

Date: 2/28/96

W. MICHAEL McCABE
Regional Administrator

Prepared by: Benjamin Kalkstein, Presiding Officer.